SUPREME COURT, U.S.

No. 372

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

ABRAHAM MAIUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Abraham Maius[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered June 15th, 1967, in a proceeding entitled: United States of America, Plaintiff-Appellee v. Abraham Maius, Defendant-Appellant, Appeal from the United States District Court for the Western District of Kentucky.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix hereto. It has not yet been officially reported.

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[1] Referred to herein as "petitioner" or "defendant."

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered June 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. #1254 (1) and 28 U.S.C. Supreme Court of the United States Revised Rules, Rules 21, 22 and 23 and Rule 52(b), Rules of Criminal Procedure.

QUESTIONS PRESENTED

I. Did the District Court err in admitting evidence from an interview taken by Internal Revenue Service Agent in the absence of counsel for Defendant?

I-a

May trial use be made of pretrial interrogation of a taxpayer by Internal Revenue Agent without counsel and without warning as to right of counsel, when—

(1) Interrogation has entered accusatory stage.

(2) Interrogation takes place in the 2nd and 3rd year of the investigation.

(3) Interrogation is made by an Agent of Intelligence Division.

(4) Interrogation takes place in the office of Intelligence Division, in a city, state, federal district and revenue district other than the location wherein the civil audit was made and the return filed.

(5) Interrogation is based on information already in Intelligence Agents' possession for three years and never in the possession of the taxpayer.

(6) Interrogation is directed toward a taxpayer who has nothing except his memory to draw upon to explain his relation to a corporation whose employment he had left three years before.

(7) Interrogation produced the specific charges mentioned in the Court of Appeals' Opinion from which taxpayer now appeals.

(8) Interrogation was therefore made when this case had already entered the criminal phase and was used for the specific purpose of securing this criminal conviction?

I-b

May such interrogations of a taxpayer be used even in the formal absence of the above modifying conditions here present, since all such interrogations are, in fact, self-incriminating?

II

Did the District Court use prejudicial coercion on the Jury in forcing it to find on three extra counts after the Jury had indicated a finding on one count — said count being revealed as the lesser, or "Abetting" Count, by the Jury's statement disclosing the deadlocked counts?

STATEMENT OF FACTS

1. As To The Trial and The Sentence.

The Appellant, Abraham Maius, was named in an indictment which originally contained eleven counts and seven other defendants namely, Tito Carinci, Edward A. Buccieri, Daniel Del Grosso, Louis Del Grosso, Edward G. Cellini, Jack Eviston and Breck C. Lutes. This indictment was returned and filed February 24, 1965.

On July 23, 1965, by order of the Trial Court, counts were dismissed against all the defendants except the

Appellant, Abraham Maius and Tito Carinci. Counts nine, ten and eleven of the indictment were likewise dismissed by the same order.

Appellant, therefore, went to trial on four counts, the Second, Third, Fourth and Fifth. The Second and Third Counts charged "an attempt to evade and defeat a large part of the income taxes due and owing by said Glen Corporation" for the years 1959 and 1960 respectively. The Fourth and Fifth Counts charged that the Appellant "did wilfully and knowingly aid and assist in, counsel, procure, and advise the preparation and presentation — of an income tax return of the Glen Corporation," for the years 1959 and 1960 respectively. The Glen Corporation owned and operated the Glen Rendezvous Night Club, which was both a supper club and a gambling casino.

After three days of testimony, the jury came in on the fourth day with a report (App. 122a). It told the court it was "pleased to report that we have found for one defendant on all counts. We have found on one count, and we did not find as yet — we are unable, probably hopelessly deadlocked, to find on two, three and five of the other defendant." The court thereupon took the verdict as to Carcinci and acknowledged the fact that there was a one-count, undisclosed, finding on Maius (App. 123a). The court however, did not accept this one-count finding and sent the jury back, after a charge which this brief will discuss later, to "see whether or not you can arrive at a verdict" (App. 124a).

The jury then came in a second time with a finding on all four counts against the Appellant, Maius (App. 125a). He was sentenced (App. 125a-126a) to serve three years on each count, sentences to run concurrently, and he was fined Five Thousand ($5,000.00) Dollars on each of the evasion counts, i.e. Counts Two and Three (neither of

which were in the jury's first report), and Twenty-five Hundred ($2,500.00) Dollars on each of the "aid in preparation of a false return" counts, i.e., Counts Four and Five. (Count Four was the one-count undisclosed finding tendered to the court on the first report.) From this sentence and from these fines the Appellant now appeals (App. 127a, 128a).

2. As To The Appellant's Relation To The Corporation.

The Appellant, Abraham Maius, is a man with a background in restaurant management which extends back to 1938. He is a member of the Cincinnati Restaurant Association and the select Gourmet Society of Cincinnati (App. 81a). He managed the Hickory Barbecue Restaurant in Cincinnati in 1941, prior to his three years active service with the Eighth Air Force, where he was assigned to Counter-intelligence and flew quite a few combat missions (App. 98a). He has never been a professional gambler, never been a dealer, never owned or had an interest in a gambling establishment (App. 99a).

He was hired by one Harold Marks, an ailing gentleman, now deceased, who was a stockholder and officer in the Glen Corporation. He was hired by Mr. Marks to manage the restaurant end of the business and to keep an eye on Mr. Marks' interest. This was indicated by a note signed by Mr. Marks, whose signature was acknowledged by Government witness Rafalske (App. 13a). It read, "Abe Maius represents my interest in the Glen Corporation due to my illness," signed Harold Marks (App. 78a).

The Appellant's duties with the Glen Corporation are best described by his own testimony from the stand under oath (App. 96a):

> "The only thing I had to do with this organization was the services I rendered the bar and the restaurant.

The other duties were seeing the management of the organization, seeing that it was properly handled, the — going to the bank. As a matter of fact, it was one of the duties that was shown to me, it had to be done, and I went to the bank, received the moneys, brought the moneys back, made deposits, and the balance of the moneys was put into the bank roll. And it was always verified by the receipts from the bank as to the amount of moneys that the bank had given me and put into the organization.

"Q. Mr. Maius, after verification by the others of the money you brought back from the bank, did you have any further concern or interest in it?

"A. None whatsoever.

"Q. Did you ever receive directly or indirectly any additional dividend or compensation over and above what you have already testified to?

"A. No sir."

What further relations he had with the corporate structure of Glen Corporation were frankly explained by the Appellant (App. 78a):

"A. After I went to work for Harold Marks, after a short period of time, he was satisfied with my knowledge and management of the restaurant and the bar. And he thought he would like to take more control, have more interest in it, probably because of the management effect that there was a chance to make more money from the restaurant and bar, and he asked me if he were to buy the other partner out would I accept the position as a stockholder just to insure my position as the manager there."

Continuing the fact story from the Appellant's direct testimony (79a), to insure his position as manager, 415 shares were transferred on the corporation books, from Lutes and Sons to the Appellant's name but with several revealing

limitations; the Appellant never received stock, the certificates remained in the book, they remained there because they continued to be in the possession of Mr. Harold Marks, his employer.

The Appellant not only had no possession, he had no power over them whatsoever. He had neither power to keep them or to direct their disposition, for on August 11, 1960, he had to sign a blank certificate, without being told to whom that block of stock would go. Incidentally, it turned out that it went to Del Grosso and Cellini, both of whom were originally implicated in this indictment and both of whom were dismissed by the court. Later, the 115 shares remaining in the Appellant's name were found by the Internal Revenue Agents to be exactly where the Appellant described them to be, namely, in the corporation's Stock Book, never removed, and in the office of the counsel for the corporation.

The dining operation included, besides the dining room, two eating areas, the kitchen and a supply room. Accommodations ran between 250 and 300 people to be served. The Appellant, being responsible for the income and the outgo of an operation of this size, was one of its signatories on one of the accounts at one of the three banks at which the corporation did business. Here, at the Westside Bank, and here only, he drew checks and made payments. Because of these necessary trips back and forth from the bank he found himself being used as a sort of bank messenger for other corporation deposits and accounts at this one bank (App. 87a):

> "A. One of the duties of mine was, because I was there during the day, to receive merchandise and so, so it was convenient for me, and, I had no objection to it, to take whatever checks there were for collection of that particular day to the bank, give it to the teller for collection, and if there were any moneys to be

picked up, I would pick up the moneys and bring them to the office of the Glen Corporation.

"Q. Now was that your sole purpose in going to the bank?

"A. No. There were times where I had to make deposits into the Glen account for payment of bills of all sorts, payment of merchandise. Besides picking up the moneys for collection, I also had to make deposits."

There was no attempt at the trial to conceal what these "other accounts" often were, so this statement of fact should be no less factual.

(App. 89a) "Q. Now where did you get the checks that you referred to as checks put in for collection? From whom did you get them?

"A. From various people in the office. At the end of the days operations, if there were checks that were received from the gaming end of the business—"

Pressed to mention names, the Appellant cited Buccieri, Cellini, Carinci and the two Del Grossos.

Equally factual is the reason the Appellant gave for carrying out the additional chores:

(App. 91a) "Q. Now, who designated you as the messenger boy for the Glen Corporation in this respect?
"A. When I first came to the organization, it was new to me, the bank or anything of that nature. They told me it would be best—
"Q. (Interrupting) No. Who told you, not 'they'.
"A. Harold Marks."

3. As To The Appellant's Relation to The Income Tax Returns.

Government witness, Rafalske, the independent C.P.A. who made up the return in question, testified that he did

not receive any assistance, counseling or help of any nature whatsoever from the Appellant (App. 13a-14a), that an operating sheet, mentioned later by Internal Revenue Agents, was requested by Mr. Marks and given to the corporation's attorney, not to the Appellant (App. 21a), that Appellant "had absolutely nothing to do with the 1958 return operation" and "nothing whatsoever to do" with the preparation of the returns for 1959 and 1960 — he furnished no information, nor did he sign them (App. 15a-16a), that checks for the quarterly returns were made out by Marks and Carinci (App. 17a).

Government witness, Frank Coots, Internal Revenue Agent, Intelligence Division, admitted on cross-examination that he had no information as to whether or not Appellant received any income which he did not show on his tax returns (App. 61a-62a), that "he did not prepare the tax returns" (corporate) (App. 113a), but that he gathered information together to furnish to Mr. Rafalske to prepare tax returns; that from his end of the business, the dining end, this was all right and that he reported to the Glen Corporation all the money he got by a listing which he turned in (App. 113a).

Government witness, Robert L. Thomas, Internal Revenue Agent, admitted that when he and Mr. Coots interviewed the Appellant in the office of the Internal Revenue, that they had had the books of the company in their possession, having gotten them from the corporation's lawyer (App. 102a), that Appellant therefore had no recourse to them, that Appellant was not told anything about "hold checks," that the agent himself didn't know such a thing existed, that the agents "talked about the composition of Day Sheets" and the Appellant's checking the Day Sheets (App. 104a), although he admitted (App. 105a) that the Appellant had left the corporation at the time.

Both these Internal Revenue Agents admitted that they called in the Appellant to the offices of the Intelligence Division, Internal Revenue Service in Cincinnati, Ohio on two occasions, the first time, a year after he had left employment at the Glen, the second time two years after he had left the Glen, and with all the books in their possession, and none in the Appellant's, they examined him, drew up a typed summary of the examination, signed it themselves, did not show it to the Appellant, and used it as the basis of their testimony against him at the trial. They further admitted that on both occasions they had warned him of his rights not to testify lest he incriminate himself, but on neither occasion did they tell him of his right to counsel, nor did he have counsel during either examination.

DECISION IN COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated June 15, 1967, affirmed the judgment of the District Court on both questions raised herein.

In regard to the questions raised in 1a and 1b in the foregoing questions presented in this petition, the Circuit Court in its opinion used the following language on pages 5 and 6 thereof:

> "A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him, and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in the law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison, and to use this evidence to send him to prison. It would seem, in all fairness that before he

answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. The Internal Revenue Service has lately been subjected to widespread criticism, because of trickery of some of its agents in unconstitutional invasion of a citizen's rights by the use of tapped telephone wires, or "bugging"; and the Commissioner has repudiated and castigated such conduct. No one would believe, however, that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, no court has held that a man who is not advised of his right to have his attorney present when questioned by an Internal Revenue agent, is thereby deprived of his constitutional rights. A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.

In accordance with the foregoing, the judgment of the district court is affirmed."

It is the contention of this petition that such language amounts to an invitation to this Court to review this cause. This contention is made more emphatic by the fact that the Circuit Court overlooked an additional factor which we submit is the controlling factor in this case; namely, the fact that these interrogations were made by an agent of the Intelligence Division, in the office of said Intelligence Division, well into the third year of the investigation, so that the matter was clearly out of the investigational stage and well into the criminal stage — a situation under-

scored by the further fact that the Intelligence agent had all the books and records and the taxpayer had none.

In regard to the question raised in II in the foregoing questions presented, the Circuit Court drew a conclusion unsupported by the record; namely, that the trial court did not realize the import of the count which the jury proffered as its finding, whereas a realistic reading of the record indicates that the trial court did know and was insistent on securing an increase in counts, in both quantity and quality of charge.

REASONS FOR GRANTING WRIT

Petitioner states he has been deprived of his constitutional right to a fair and impartial trial because of the admission of improper evidence and because of the refusal of the Court to accept a finding on a lesser count, and its insistance on the jury finding on three extra counts.

Petitioner further states that, because of the foregoing, he will be deprived of his liberty without due process of law — all in violation of the Fifth Amendment to the United States Constitution.

ARGUMENT

I-a

DID THE DISTRICT COURT ERR IN ADMITTING EVIDENCE FROM AN INTERVIEW TAKEN BY INTERNAL REVENUE AGENTS IN ABSENCE OF COUNSEL, UNDER THE CONDITIONS OF THIS CASE?

The position of the Petitioner is directly relevant to the outcome of this case. Right or wrong, the Circuit Court frankly based its opinion on statements in the con-

tested interviews and said so in as many words on page 5 of the opinion:

> "The testimony further disclosed that the appellant had examined the 1959 and 1960 income tax returns before they were filed. The fact that appellant did not sign or file the tax returns is not material."

The Circuit Court quite clearly considers this to be the crux of the matter; and quite properly so, for this would indeed be a crucial act if it were so and if it were proper evidence. However, it so happens that this is precisely the statement which the Intelligence agent read into the record from his reported interview, and not the testimony of the petitioner given in trial. Fortunately, the Government's own brief, before the Circuit Court makes this clear. On page 30 thereof, we read:

> "Appellant stated to the agents that he examined the 1959 and 1960 income tax returns of the Glen Corporation before they were filed. (Supp. R. 84B)"
>
> * * *
>
> "While he denied at the trial that he examined the tax returns, saying he merely signed the check to pay the tax shown on the 1959 return (R92a-93a) his proprietory interest in the corporation makes his earlier admission more credible."

Obviously, therefore, the "evidence" from these contested interrogations was central to the Circuit Court's consideration. But more central to the issue before us now is what the Circuit Court neglected to consider at all, — the distinction between a preliminary investigation for the purpose of audit by the Civil Division of Internal Revenue and a cross-examination of a taxpayer by its Criminal Division, the Intelligence Division, for the precise purpose for which it WAS used; namely trapping the taxpayer into a criminal conviction by use of his own statements.

However, the distinction in question has been set forth clearly in the case of *United States* v. *Turzynski*, USDC, No. Dist. Ill., East. Div. 66 C.R. 151, June 2, 1967, 67-2 USTC 9489, — Fed. Supp. —, in which the Court holds that when an investigation turns from civil to criminal, as it does when the case is transferred from the Internal Revenue Audit Division to the Intelligence Division, the taxpayers constitutional rights, including his right to counsel, must be made known to him. To quote the Court directly:

> "The United States Internal Revenue Service conducts both civil investigations to determine whether deficiencies should be assessed against taxpayers and criminal investigations to develop evidence for potential criminal prosecution. In practice, civil investigations are conducted by a different division at the I.R.S. than that which conducts criminal investigations. Civil investigations are conducted by Internal Revenue Agents. As soon as an Internal Revenue Agent has reason to believe that the taxpayer under investigation has committed a criminal violation, he must refer the case for criminal investigation. If his superiors in the civil department agree with his conclusions, the case is referred to the Intelligence Division of the Internal Revenue Service whose jurisdiction is limited to criminal investgations. The investigators of the Intelligence Division are known as special agents."

It is because of this distinction that several other cases of late date from other circuits do not apply to this present case.

Kohatsu v. *United States*, 351 F. 2d 898 (C.A. 9th), cert. denied 384 U. S. 1011. There was no evidence herein that the appellant had been called into the Internal Revenue office and cross-examined without any books, references or memoranda to consult on a matter that took place two to three years previously. On the contrary, in the *Kohatsu*

case, the *appellant himself* turned over to the agent "numerous bookkeeping records and related material," and "for approximately one year periodic meetings were held between appellant and agent." Furthermore *Kohatsu* saw the transcript of his interview and signed it. The facts could hardly be more in contradiction to the present case.

Smith v. *United States,* 250 F. Supp. 803, 806 (Dist. N.J.). The *Smith* case, at page 805, indicates that a letter was sent to the petitioner, which stated, "You may appear with counsel, if you so desire, or with any person who has knowledge of *the facts in your case* whom you wish to be present." (Emphasis ours)

The *Smith* case, at page 806: ". . . the uncontroverted facts disclose petitioners waived the right or privilege of having counsel . . ."

The *Smith* case, at page 806: "Indeed, as to persons *compelled* to appear, the Supreme Court has not decided the question as to whether the Administrative Procedure Act affords the right to counsel in a *fact-finding non-adjudicative investigation.*" (Emphasis the court's) — "What then of persons who appear voluntarily? This is a question we need not decide and we do not do so."

True, the Court adds, "the authorities support the proposition that *proceedings such as those in this case* are not criminal prosecutions." (Emphasis ours) But in this present case the facts show very different proceedings indeed. Here the investigation *did* involve criminal prosecution. The Appellant was never openly and honestly told that the interview was directly toward "your case," as in the *Smith* case. He was led to believe that he was being questioned about a corporation for which he no longer worked, a corporation for which he had never made up, signed or filed any tax returns. He was lulled into believing he was merely helping agents understand how the Glenn Corporation worked its finances, as much as he knew.

In the First Circuit, *United States* v. *Morgan,* (C.A. 1) 62-1 USTC 9449, — Fed.2d —, it was held that Internal Revenue Service agents are not required to warn the taxpayer of his right to counsel at the investigative stage of an examination. Following this is *Schlinsky* v. *United States of America,* 261 Fed. Supp. 265, in the same Circuit taking the same position. Likewise, the Fifth Circuit in *Mathis* v. *United States of America,* (C.A. 5) 67-1 USTC 9408, — Fed.2d —, on affirming an unreported District Court case, took the position that the Fifth Circuit had taken in the *"Morgan"* case (supra) and the Ninth Circuit in the *"Kohatsu"* case (supra); namely, "That an Internal Revenue agent was not required to warn a taxpayer of his right to counsel at the investigative stage of an examination. Thus, evidence so obtained was admissible under the theory of 'preliminary stage necessary to audit.' "

I-b

MAY SUCH INTERROGATIONS OF A TAXPAYER BE USED EVEN IN THE FORMAL ABSENCE OF THE MODIFYING CONDITIONS HERE PRESENT, SINCE ALL SUCH INTERROGATIONS ARE, IN FACT, SELF-INCRIMINATING?

The language used in the last two pages of the Opinion in this case at bar, which we have quoted above, indicates that this question merits consideration by this court on an even broader basis than we have, up to this point, contended.

For the Circuit Court in its Opinion, as we have pointed out, made no distinction between preliminary and criminal proceedings. Its criticism thereof is not restricted to the later stage alone.

Rather than bedeck ourselves in the purloined plumage of erudition not our own, that is, by borrowing from an

article and concealing the author, we draw this court's attention to an article of such stature that it is worthy of presentation in toto to this distinguished Court. We refer to a study in the June issue, 1967 of the American Bar Association Journal (Volume 53) p. 517, entitled: "Constitutional Rights in Criminal Tax Investigations." The author, Mr. Paul P. Lipton of the Wisconsin Bar, and a former trial attorney in the Chief Counsel's Office, Internal Revenue Service begins with the following strong words:

> "There can be little doubt that the effectiveness of criminal tax prosecutions depends upon the unwitting sacrifice of constitutional rights. Most prosecutions are based upon evidence furnished by the taxpayer, and those involving evasion of individual income taxes seldom could be maintained without the taxpayer's co-operation during the investigation. It is apparent, therefore, that additional safeguards are essential to protect the constitutional rights of suspected tax evaders."

Two observations in the American Bar Association Journal article have special bearing on the case at bar, and we proffer them herewith:

> "Criminal tax investigations are conducted by special agents attached to the Intelligence Division of the Internal Revenue Service. The sole function of a special agent is to uncover evidence justifying a criminal prosecution. The success of his efforts depends mainly on his ability to obtain the taxpayer's co-operation. . . ." Page 518.
>
> "The absence of physical restraint does not obviate or minimize the need for safeguards to protect the privilege. The suspected tax evader is less likely to realize the consequences of co-operation than the arrested individual who is interrogated about a violent crime." Page 519.

This case now on appeal came after *Escobedo* v. *State of Illinois,* 378 U.S. 478, 84 S. Ct. 1758 and before *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602. The special circumstances involved herein and the special language in the opinion of the Court of Appeals would merit this Court extending and applying the principles of *"Escobedo"* and *"Miranda"* to the facts in this case.

II

DID THE DISTRICT COURT USE PREJUDICIAL COERCION ON THE JURY IN FORCING IT TO FIND ON THREE EXTRA COUNTS AFTER IT HAD INDICATED A FINDING ON ONE COUNT?

The District Court answered this question "No."

Defendant-Appellant contends the answer should be "Yes."

This Court is well aware of the usual problems involved in prejudicial coercion cases. The usual elements are all present here but with this big difference. Here an extra factor is present which not only in itself makes this case reversible but also gives to the other pressure factors a special force, so that such other factors, often dismissed by lenient Courts of Appeal as a necessary firmness required to make the jury system work, become in this case censorable.

The extra factor here, the big difference in this case, is the fact that the jury *had worked* and *had produced a verdict* which it proffered to the court. It had found against Carinci on six counts and had found on one count regarding Maius. It stated it was deadlocked on the other three counts on Maius. In other words, this is not a case of Pressure versus Hung Jury or Mistrial. It is a case of pressure being used, not to produce a verdict, but to increase it. The court called for and accepted the verdict

on Carinci. The court refused to accept the one count found on Maius but sent the jury back to bring in a clean sweep.

Now for purposes of argument we will assume here that this undisclosed count was *against* Maius. If it were in his favor, the injustice is so much greater it need scarcely be argued.

Permit us to point out, at the risk of stressing the obvious, that in this case the jury did not come in and confess its inability to function. It came in and stood ready to make a report, part of which the court accepted, part of which the court rejected. It did not say it was unable to make a finding on Maius. It stated it had made one, but since this finding involved only one count apparently it did not satisfy the court. The court insisted on more counts despite the fact that the jury said "we are unable, probably hopelessly deadlocked to find on two, three, and five of the other defendant" (Maius) (App. 122a).

Now the law on this point is clear, though the jury was never so informed nor did the court itself give any evidence of recognizing it.

> "In order to be valid, a verdict need not finally pass on and dispose of all the accusations contained in an indictment and a verdict on one or more counts is sufficient, although the jury report a disagreement as to the other counts." *Am. Jur. Vol.* 53, Sec. 1045 Page 724; *Selvester* v. *United States,* 170 U.S. 262 42 L. ed. 1029, 18 Sup. 580; 114 ALR 1406.

In flat contradiction to this, the court flatly concludes with a completely improper and misleading statement:

> "As I say, this would have to be done over if this jury is unable to agree." (App. 124a)

This reviewing Court will notice that the opening phrase "the chances are" has now become a fixed certainty. This

is wrong on two counts; first, the court cannot tell whether or not the Department of Justice would or would not bring another case on the three remaining counts; and secondly, and *much more important,* the impression is left with the jury that there must be total agreement to have a verdict. Now, in point of fact, this is *not* a matter of a mistrial, a verdict having been arrived at and proffered to the court. But it may well be noted that even if it were, the jury would have the right to stand on its position without being given the impression that it had failed in its function.

The function of a jury is not merely to grind out guilty pleas or even not guilty pleas. As the Court of Appeals for the District of Columbia pointed out in *Williams* v. *United States,* decided in 1964, 338 Fed. 2d 530:

> "Indeed a mistrial is as much a part of the jury system as a unanimous verdict."

This Court will take notice from the dates involved that this case covered three days of testimony. It was not a forty days' case nor was this a forty-count indictment. Actually, this jury brought in seven findings out of the eight counts presented to it so that it cannot be criticized for a disproportionate finding. Even in regard to Maius it found in one out of four counts, scarcely a ratio to shock the judicial conscience of a reviewing court.

The sequence of events revealed in the record is more effective than argument.

> "BY THE COURT: Ladies and gentlemen, have we arrived at a verdict in this case?
>
> "FOREMAN OF THE JURY: Your Honor, as Foreman of the jury, I'm pleased to report that we have found for one defendant on all counts. We have found on one count, and we did not find as yet — we are unable, probably hopelessly deadlocked, to find on two, three and five of the other defendant.

"BY THE COURT: Well, Mr. Foreman, read the verdict upon which the jury has made a complete finding.

"FOREMAN OF THE JURY: The one that we found?

"BY THE COURT: Yes, sir.

"FOREMAN OF THE JURY: We, the jury, find defendant Tito Carinci guilty as to count one, guilty as to count two, guilty as to count three, guilty as to count six, guilty as to count seven and guilty as to count eight, J. Benjamin Horton, Foreman.

"BY THE COURT: Now, I'll ask each individual juror if that is your verdict?

"(WHEREUPON, ALL JURORS INDICATE AFFIRMATIVELY)

"BY THE COURT: Now, as I understand, *in regard to the other defendant you have found only on one count?*" (Emphasis added)

"FOREMAN OF THE JURY: Yes, sir.

"BY THE COURT: And — let me say this to you, ladies and gentlemen, without knowing the one count which you have found, as I recall, Maius was in four counts, is that — or three counts?

"FOREMAN OF THE JURY: Four.

"BY THE COURT: One — two for tax evasion and two for assisting in the preparation of a fraudulent return." (App. 122a, 123a)

The jury, while formally refraining from stating the count on which it had agreed and stood ready to report, clearly indicated what that count was by stating the counts on which it had disagreed. The court confirmed this by asking the jury "Maius was in four counts, is that — or three counts?"

"FOREMAN OF THE JURY: Four.

"BY THE COURT: One — two for tax evasion and two for assisting in the preparation of a fraudulent return." (App. 123a)

By simple elimination, it is clear that the court then knew that the single count found by the jury was *Count Four;* that is, the count which charged "assisting in the preparation of false return," a lesser offense than tax evasion. Apparently, this did not satisfy the court, for it then addressed the jury as follows:

> "Let me say this to you, members of the jury. The chances are that without a finding on these other counts that this defendant would have to be retried on the counts upon which this jury has not yet agreed. Of course, you realize that — the time required and the costs, not only to the Government but to the parties, of a trial of this nature. You realize further that these same facts substantially would have to be given to another jury, another four days in a trial, perhaps more, would result, and certainly the next jury that would consider this case is no more able to determine it than you ladies and gentlemen are, having — knowing that they will hear substantially the same evidence. And certainly they would be no more intelligent than you ladies and gentlemen are.
>
> "Now, it is true that, and the Court does not desire that any juror should surrender his own conscientious convictions, but, on the other hand each juror in order to perform his duty must perform it conscientiously and honestly and, of course, according to the law and the evidence and, although the verdict, and each verdict, to which a jury agrees must be his own verdict and the results of his own convictions and not a mere acquiescence in the conclusions of his fellow jurors, yet, as I told you when you were first qualified as jurors, it's often difficult to bring twelve minds to a unanimous result. And in order to do so, of course, you are required and must examine the questions presented with candor, and certainly with a proper regard and deference to the opinions of each other.
>
> "Now, I — do you think there is an opportunity or a chance that you might be able to reach a verdict on these other counts? I'd appreciate it very much if you

would undertake to consider them further and see whether or not you can reach a verdict.
"As I say, this would have to be done over again if this jury is unable to agree. Will you give it another try, ladies and gentlemen? (App. 123a, 124a)

This Court's attention is directed once more to the last paragraph in which the trial court unequivocally states something which is not in its power to state and which is definitely misleading, in that it led the jury to believe that it simply had to make further finding.

True, these instructions do carry the phrases which have been recommended by certain cases as a sort of charm against "prejudicial coercion;" phrases like "the Court does not desire any juror to surrender his own conscientious objections" and "each verdict to which a jury agrees must be his own verdict and the results of his own convictions and not a mere acquiescense in the conclusions of his fellow jurors." But in this case, these phrases are vain rhetoric, and for the following reasons:

(1) No mention of such consideration for individual conviction was made in the charge in chief. It is introduced here only for the purpose of immediately brushing it aside and counterbalancing it by both words and acts of the court.

(2) Even in their physical inclusion, they are clearly a parenthetical observation, contrary to the thrust of the whole instruction by the court, the very syntax in which they are couched being keyed to a minor and modifying position.

(3) Most important of all, the cases which consider such phrases efficacious in absolving a charge from "prejudicial coercion" are cases in which *no verdict was presented.* Therefore, the modifying effect claimed by certain cases for these phrases does not operate here. Rather, we respectfully submit, this Court may well consider such in-

structions, even though modified by "saving" phrases, as reversible error, as did the Courts of Appeals in the Fourth and Fifth Circuits, in the following cases:

United States v. *Rogers,* 289 Fed. 2d 433, 434, 437 (C.A. 4);
Powell v. *United States,* 297 Fed. 2d 318 (C.A. 5, 1961);
Green v. *United States,* 309 Fed. 2d 852 (C.A. 5, 1962).

In summary, here the court applied pressure, not to *produce* a verdict, but to *increase* it, thereby exercising a negative veto power over the proper prerogatives of the jury. In addition to ignoring a proffered verdict, this charge is one of the many versions of the *Allen* case charge (named from *Allen* v. *U.S.,* 492, 501 [1896]). The *Allen* case charge, with its "Dynamite charge," is now on its way out, taking with it its "saving" phrases, inserted to deaden the sound of the dynamite but not its effect.

Green v. *United States,* supra, at page 854 points out:

> "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

December 6, 1966

Before: CELEBREZZE and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

This cause is argued by William J. Dammarell for plaintiff-appellant and by Donald A. Hensen for defendant-appellee and is submitted to the Court.

JUDGMENT

(Filed June 15, 1967)

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

No. 16981

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABRAHAM MAIUS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Decided June 15, 1967.

Before: CELEBREZZE and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

McALLISTER, Senior Circuit Judge. The Glen Corporation of Newport, Kentucky, operated a gambling place, as well as the Glen Rendezvous and Tropicana, consisting of a hotel, restaurant, bar and night club.

When, in August 1962 and October 1963, Internal Revenue agents investigated the income tax returns of the Glen Corporation, appellant Maius, who, among other positions he held in the organization, was one of the managers, explained to the agents the accounting procedures of the corporation. He stated that he prepared a daily sheet, which was used by one of the defendants in this case, Tito Carinci, in making entries in a book, which he identified as the record of "casino net wins and losses" for the years 1959 and 1960.

"Gambling loss collection," as the phrase is used in this case, are collections made by banks for the benefit of the Glen Corporation, on checks given by gamblers in payment of their gambling losses. The Government showed that these gambling loss collections paid by the bank to the Glen Corporation amounted to $207,342.67 for 1959, and $144,435.21 for 1960. However, the amount of these same collections was set forth in the Glen Corporation's income tax returns as $73,900 for 1959, and $46,968 for 1960.

As a result, the corporate income was understated on the income tax returns by $133,442.67 for 1959, and by $97,467.21 for 1960.

The additional tax due on the above unreported income was $69,309.14 for 1959, and $46,585.72 for 1960.

Appellant, before being employed by the Glen Corporation, had considerable experience as a restaurant manager. He was hired by the corporation to manage the bar and the restaurant. He also helped to manage the company and to do a large amount of its banking business. He was issued 415 shares of Glen Corporation stock on March 4, 1959, and this certificate was later canceled, and a new certificate was issued to him for 115 shares.

As a result of the investigation of the corporation by the Internal Revenue Service, eight persons were indicted, including the appellant. On July 26, 1965, appellant and Tito Carinci were tried for willfully attempting to evade income taxes of the Glen Corporation for the years 1959 and 1960, in violation of Section 7201 of the Internal Revenue Code of 1954, and for willfully and knowingly aiding and assisting in preparing fraudulent income tax returns of the Glen Corporation for the years 1959 and 1960 in violation of Section 7206(2) of the Internal Revenue Code of 1954. The jury found appellant guilty on four counts

of the indictment and he was thereafter sentenced to concurrent prison terms of three years and fined a total of $15,000.

The main issues as stated by appellant are: (1) Did the district court use prejudicial coercion on the jury in forcing it to find on three extra counts after it had indicated a finding on one count? (2) Was there sufficient evidence to sustain the verdict? (3) Were statements which appellant made to Internal Revenue agents properly admitted in evidence when the agents, who had advised appellant of his rights under the Fifth Amendment, did not inform him that he could have an attorney present during the interviews?

The first contention of appellant that the district court used prejudicial coercion in forcing the jury to find on three counts after it had indicated a finding on another count, is based upon the court's having given a so-called Allen charge* in the following language:

> "Let me say this to you, members of the jury. The chances are that without a finding on these other counts that this defendant would have to be retried on the counts upon which this jury has not yet agreed. Of course, you realize that—the time required and the costs, not only to the Government but to the parties, of a trial of this nature. You realize further that these same facts substantially would have to be given to another jury, another four days in a trial, perhaps more, would result, and certainly the next jury that would consider this case is no more able to determine it than you ladies and gentlemen are, having—knowing that they will hear substantially the same evidence. And certainly they would be no more intelligent than you ladies and gentlemen are.
>
> "Now, it is true that, and the Court does not desire

* *Allen* v. *United States*, 164 U.S. 492.

that any juror should surrender his own conscientious convictions, but, on the other hand each juror in order to perform his duty must perform it conscientiously and honestly and, of course, according to the law and the evidence and, although the verdict, and each verdict, to which a jury agrees must be his own verdict and the results of his own convictions and not a mere acquiescence in the conclusions of his fellow jurors, yet, as I told you when you were first qualified as jurors, it's often difficult to bring twelve minds to a unanimous result. And in order to do so, of course, you are required and must examine the questions presented with candor, and certainly with a proper regard and deference to the opinions of each other.

"Now, I — do you think there is an opportunity or a chance that you might be able to reach a verdict on these other counts? I'd appreciate it very much if you would undertake to consider them further and see whether or not you can reach a verdict."

The charge as given would be proper in an attempt to secure some kind of verdict as to innocence or guilt. Appellant says that the jury had already reported its view as to innocence or guilt on one count — Count 4. But this is not the case. The jury rather stated that it had found on Count 4, but that it was hopelessly deadlocked on Counts 2, 3, and 5. It did not, however, state whether it had found appellant guilty or not guilty on Count 4. If its verdict had been not guilty on Count 4, the trial court was correct in stating that the case would have to be retried on the other counts. Counts 2 and 3 charged an attempt to evade and defeat income taxes. Counts 4 and 5 charged willfully and knowingly aiding and assisting in preparing false income tax return. We see no violation of appellant's rights in the court's giving the so-called Allen charge. This is not a refusal of the trial court to receive a verdict on a lesser charge, and sending the jury back to at-

tempt to reach a verdict on a higher charge. There is no evidence that the court applied pressure to increase a verdict which it had already agreed upon. No specific finding or verdict had been announced by the jury—only a statement by the jury finding, without a statement what that finding was; and there was no knowledge on the part of the court or anyone else—except the jury as to what the finding was. We find no error in the charge of the trial court.

Appellant contends that there was not sufficient evidence to sustain the verdict. An examination of the record shows that there was evidence from which the jury could find that appellant was involved in conduct to conceal the actual receipt of the corporate income, and in accounting for it. As mentioned, he did most of the banking business for the corporation. He was the bookkeeper in respect to the customer checks, and maintained a list of the checks taken to the bank for collection. He also kept track of the collections and posted them on the records which were used in the preparation of the corporate tax returns.

The testimony further disclosed that appellant had examined the 1959 and 1960 income tax returns before they were filed. The fact that appellant did not sign or file the tax returns is not material. There was sufficient evidence to support the conclusion of the jury that appellant was a party to the scheme of concealing the receipt of income and not reporting it on the corporate records, and that his knowledge of the use of such records in preparing the tax returns is sufficient, under all of these circumstances, to sustain the charge that he willfully and knowingly aided, assisted, and counseled in the preparation and presentation to the Internal Revenue Service of the false returns.

With regard to the contention that statements made by appellant to the Internal Revenue agents were improperly

admitted in evidence, when the agent, who had advised him of his rights under the Fifth Amendment, did not inform him that he could have an attorney present during the interview, we find no error. Appellant was not under arrest or under duress in the legal sense of the term when he made the statements in question. A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him, and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in the law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison, and to use this evidence to send him to prison. It would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. The Internal Revenue Service has lately been subjected to widespread criticism, because of trickery of some of its agents in unconstitutional invasion of a citizen's rights by the use of tapped telephone wires, or "bugging"; and the Commissioner has repudiated and castigated such conduct. No one would believe, however, that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, no court has held that a man who is not advised of his right to have his attorney present when questioned by an Internal Revenue agent, is thereby deprived of his constitutional rights. A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would

decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.

In accordance with the foregoing, the judgment of the district court is affirmed.

CERTIFICATE OF CLERK

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of proceedings in the case of United States of America vs. Abraham Maius, No. 16981, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole record.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 5th day of July, A.D. 1967.

/s/ CARL W. REUSS
Clerk of the United States Court of Appeals
for the Sixth Circuit.

(SEAL)